

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1332

To be argued by
EDWARD R. KORMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1332

UNITED STATES OF AMERICA,
Cross-Appellant,
- against -
JULIENNE BUSIC,
Cross-Appellee.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Cross-Appellant,

-against-

Docket No. 77-1332

JULIENNE BUSIC,

Cross-Appellee.

- - - - -x

BRIEF FOR THE APPELLANT

Preliminary Statement

The United States of America appeals from that part of the judgment of conviction entered by the District Court for the Eastern District of New York, Bartels, J., on July 20, 1977, which designated that the defendant, Julianne Busic, be eligible for parole after serving eight years of a mandatory sentence of life imprisonment (A. 1). The sentence was imposed upon her conviction, after a trial by jury, of the offense of air piracy from the commission of which a death resulted (49 U.S.C. § 1472(i)). The defendant was also convicted of conspiracy to commit the offense of air piracy, in violation of 18 U.S.C. § 371, and was sentenced to a five year term of imprisonment to be served concurrently with the sentence of life imprisonment (A. 1). The jurisdiction of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1651.

STATEMENT OF THE CASE

The defendant, Julianne Busic, was convicted of air piracy from which a death resulted. On June 20, 1977, she was sentenced to life imprisonment as mandated by 49 U.S.C. § 1472(i) (1) (B) of Title 49 where the death of another person results from the commission of the offense (A. 1). The district court, however, designated in the judgment of conviction that the defendant shall be eligible for parole after serving eight years of her sentence, instead of the minimum of ten years, which she would be required to serve before becoming eligible for parole (18 U.S.C. § 4205(a)).

We believe that the district court had no power to provide that the defendant should be eligible for parole prior to serving ten years of her life sentence. Moreover, given the serious nature of the offense, involving as it did the hijacking of an airplane and the planting of a bomb in Grand Central Station, that ultimately exploded and killed a member of the New York City Police Department Bomb Squad, we believe that we cannot acquiesce in this illegal sentence.^{1/}

^{1/} As the New York Times recently observed (August 5, 1977, p. A.20):

"For terrorists, however there may well be a punishment that could deter. The punishment is not capital; terrorists are usually ready to die for their cause. More difficult for a terrorist to contemplate would be a very long prison term - say 35 years - without possibility of parole."

ARGUMENTPOINT ONE

THE DISTRICT COURT HAD NO POWER
TO DESIGNATE THAT THE DEFENDANT
BE ELIGIBLE FOR PAROLE PRIOR TO
SERVING TEN YEARS OF HER MANDA-
TORY LIFE SENTENCE

A. Introduction

The offense of air piracy is one of the most serious offenses for which a defendant may be convicted. Section 1472(i)(1) of Title 49 of the United States Code provides that:

"Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished -

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or imprisonment for life."

The defendant Julianne Busic stands convicted of air piracy resulting in the death of another person and, because the United States Attorney stipulated that the evidence was insufficient to establish any of the aggravating circumstances which would warrant the imposition of the death penalty, she was sentenced to life imprisonment. Pursuant to 18 U.S.C. § 4205(a), which provides that a prisoner shall become eligible for release on parole after serving one-third of a sentence

for a term of years "or after serving ten years of a life sentence", the defendant would become eligible for parole after serving ten years of the mandatory life sentence which the district court imposed.

The district court, however, relying upon 18 U.S.C. § 4205(b) (1), held that it had the power to designate that the defendant be eligible for parole after serving eight years of her sentence. Section 4205(b) provides:

"Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine."

We believe that it is plain from the language of Section 4205(b), and its legislative history, that a defendant who is convicted of an offense which carries a mandatory life sentence may not be designated for earlier parole eligibility. Moreover, it is our view that the reasoning of the district court to the contrary is plainly erroneous, and that the cases relied on by the defendant are inapposite.

B. Congress Plainly Manifested Its
Intent to Preclude Early Parole
Eligibility Where a Defendant Is
Subject to a Mandatory Life Sentence.

We begin by observing that Section 4205(b), by its terms, does not authorize a district court judge to designate early parole eligibility for a defendant who has been convicted of an offense for which a life sentence is mandatory. Section 4205(b) begins by permitting early parole eligibility to be conferred by the sentencing judge in those cases in which he has discretion to determine that "the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year." Here, of course, the sentencing judge has no such discretion. Congress has determined that the defendant, Julianne Busic, be sentenced to life imprisonment.

Moreover, the very provisions of Section 4205(b)(1) and (b)(2), which set out the two alternative procedures for early parole eligibility, do not by their terms apply to a mandatory life sentence. Section 4205(b)(1) permits the judge to "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one third of the maximum sentence imposed by the court." This provision is applicable by its terms only where the defendant has been sentenced to imprisonment for a

definite term of years, since it is not possible to calculate "one third" of a life sentence.^{2/}

Similarly, Section 4205(b) (2) provides that the court may "fix the maximum sentence of imprisonment to be served, in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine." This provision, of course, assumes a case in which the sentencing judge has discretion to "fix the maximum sentence of imprisonment to be served", and obviously has no applicability where Congress has fixed the maximum sentence and provided for parole eligibility after ten years. 18 U.S.C. § 4205(a).

Accordingly, if all that we had to rely on was the language of Section 4205(b), it would be difficult to justify its application here. There is, however, an explicit statement of Congressional intent that a defendant subject to a mandatory sentence not have the benefit of the early parole eligibility provided for in Section 4205(b).

In 1958 when Congress enacted Section 4205(b), then Section 4208(a), as well as Section 4216, then Section 4209, which deals with eligibility for Youth Correction Act treatment

^{2/} Of course, Congress was aware of this problem. The general parole eligibility statute, 18 U.S.C. § 4205(a), provides for parole eligibility after a defendant has served one third of a sentence for a term of years, or after "serving ten years of a life sentence."

for persons between the ages of twenty-two and twenty-six, the legislation adding these two sections contained the following proviso (Pub. L. 85-752, Section 7):

"This Act does not apply to any offense for which there is provided a mandatory penalty."

Moreover, the legislative history of Section 7 of Pub. L. 85-752, makes plain its applicability here. S. Rep. No. 2013 (1958), 85th Cong., 2 Sess., accompanying H. J. Res. 424 (which became Pub. L. No. 85-752), 2 U.S. Code Cong. & Adm. News, 3891-3892, contained the following statement:

"As set forth under 'Purpose' above, the proposed legislation provides that it shall not apply to any offense for which there is provided a mandatory penalty. This is to assure that the mandatory penalties provided by statute for special categories of crime, such as armed robbery of a post office, and violations of the Narcotic Control Act of 1926, as amended by the Narcotic Control Act of 1956, shall not be affected in any way by the provisions of the bill" (emphasis added).

Quite plainly this proviso to the legislation which added former Section 4208, now Section 4205, shows that the sentences imposed here are "mandatory" sentences within the ambit of Section 7 of Pub. L. 85-752.

Section 2114 of Title 18, the provision dealing with the armed robbery of a post-office, one of "the special categories of crime" which were cited as illustrative of the mandatory sentences that would not be affected by former Section 4208, now Section 4205, provides merely that an offender "shall be imprisoned twenty-five years." Similarly, while some offenses defined in the Narcotics Control Act contained explicit provisions precluding parole, other provisions merely provided mandatory minimum penalties. See, e.g. United States v. Kleinzahler, 306 F. Supp. 311, 316 (E.D.N.Y. 1969). By contrast, of course, Section 1472(i)(1) provides for a term of imprisonment for "not less than twenty years" and, if death results, life imprisonment. Surely Section 7 of P.L. 85-752 is as applicable here as it is to the armed robbery of a post office, or the first time possessor of marijuana whom Judge Weinstein held in United States v. Kleinzahler, 306 F. Supp. 311, 314-317 (E.D.N.Y. 1969), would not be eligible for Youth Correction Act treatment because the offense carried a mandatory minimum sentence of two to ten years.

C. The District Court's Reasoning
Was Plainly Erroneous

The district court agreed that, under Section 4205(b), as originally enacted, it would have no power to designate early parole eligibility for the defendant, because the act of Congress which enacted Section 4205 (then Section 4208) into law contained an express statement that: "This Act does not apply to any offense for which there is provided a mandatory penalty" (Pub. L. 85-752, Section 7). The district court judge, however, held that this declaration of congressional intent was no longer of any force and effect, although he acknowledged that the issue was not free from doubt. This conclusion rested on the fact that in 1976, in the course of a general revision of Chapter 311 of Title 18, Congress repealed former Chapter 311, of which Section 4208 was a part, and substituted a new Chapter 311, without reenacting Section 7 of P.L. 85-752. Although the critical provisions of former Section 4208(a) were reenacted without change, except for being placed in Section 4205(b), the district court reasoned that the failure of Congress to reenact Section 7 reflected an intent on the part of Congress to change prior law and permit early parole eligibility even where a mandatory sentence is imposed (A. 16-18).

This reasoning is plainly erroneous. As Mr. Justice White recently observed in Muniz v. Hoffman, 422 U.S. 467, 470 (1975):

"To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable. As this Court said in United States v. Ryder, 110 U.S. 729, 740, 4 S.Ct. 196, 201, 28 L.Ed. 308 (1884): 'It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed.'"

Rather than indicating any intention to change prior law, the legislative history of the 1976 revision shows that, in reenacting without change the provisions of former Section 4208(a), Congress did not intend to make any change in prior law or practice. S.R. 94-369, 94th Cong., 2nd Sess., pp. 22-23, 1976 U.S. Code Cong. & Adm. News, p. 343-344. Moreover, the reenactment of former Section 4208(a) without change is particularly significant because the language of Section 4208(a), now Section 4205(b), does not by its terms authorize early parole eligibility where a life sentence is mandatory.

D. The Cases Relied Upon By the Defendant Have No Applicability Where a Defendant Is Subject to a Mandatory Life Sentence.

We recognize that there is authority suggesting that, where the mandatory sentence is for a term of years, rather than for life, the district court does have the power to designate

the defendant as eligible for early parole. See United States v. Remling, 548 F.2d 1274, 1275 (C.A. 6, 1977); Jones v. United States, 419 F.2d 593, 598 (C.A. 8, 1969); United States v. Ortiz, 488 F.2d 175 (C.A. 9, 1969). Contra: United States v. Kleinzahler, 306 F. Supp. 311, 315-316 (E.D.N.Y. 1969); United States v. Woods, 484 F.2d 127, 139 (C.A. 4, 1973); United States v. Cameron, 351 F.2d 448 (C.A. 7, 1965); United States v. Howard, 449 F.2d 1086, 1092-1093 (C.A.D.C. 1971). The cases supporting this view, however, appear to rest on two considerations which are inapplicable to a case in which a life sentence is mandatory.

When Congress originally enacted the air piracy statute in 1961 and provided for a mandatory of not less than twenty-years, if the death sentence was not imposed, the accompanying House Report, H.R. 985, 87th Cong., 1st Sess., 1961 U.S. Code Cong. & Adm. News, 2563, 2568, contained an explanatory note which observed:

"If the death penalty is not imposed, the punishment imposed by the court shall be imprisonment for not less than 20 years.

Under other provisions of law contained in chapter 311 of Title 18 of the United States Code, relating to parole of Federal prisoners, an individual sentenced to imprisonment for life or for any term of years in excess of 45 becomes eligible for parole after serving 15 years of the sentence imposed. An individual sentenced to a lesser term of years becomes eligible for parole after serving one-third of the sentence

imposed. The Federal courts are also given discretion, in the case of sentences to imprisonment for more than 1 year, to specify a minimum term of imprisonment after which a federal prisoner may be eligible for parole. This minimum term may be less than one-third of the sentence imposed, but may not exceed one-third of such sentence" (emphasis supplied).

This explanatory note has been cited as showing that Congress intended to exempt those convicted of air piracy, one of the most serious offenses in the United States Code, from the ban on early parole eligibility. United States v. Ortiz, 488 F.2d 175, 178-179 (C.A. 9, 1973); United States v. Remling, 548 F.2d 1274 (C.A. 6, 1977). But this legislative history accompanied an earlier version of the air piracy statute which did not provide for a mandatory life sentence. And by its terms the italicized language, like former Section 4208, which it paraphrased, simply does not apply to a life sentence, since it is not possible to calculate "one-third" of a life sentence. ^{3/} Moreover, it is apparent that the author of the italicized portion of House Report No. 985 was unaware of

^{3/} The only air piracy case cited below by the defendant, United States v. Ortiz, 488 F.2d 175, 178-179 (C.A. 9, 1973) was a case in which the defendant was sentenced to twenty years in prison. Although this does not appear in the opinion, it was the only sentence (other than death) that could have been imposed under the pre-1974 version of 49 U.S.C., §1472(i)(1). Had the death sentence been imposed, the issue of early parole eligibility would not have come up in the case. United States v. Remling, 548 F.2d 1274 (C.A. 6, 1977), which followed United States v. Ortiz, likewise involved the imposition of a sentence for a term of years.

Section 7 of P.L. 85-752, which made it plain that the provisions of former Section 4208(a) were not available where a mandatory minimum sentence must be imposed. Accordingly, the statement in the House Report No. 985, without more, cannot be deemed to have altered the effect of Section 7. As Chief Justice Marshall observed long ago, "a mistaken opinion of the legislature concerning the law, does not make law."

Postmaster-General of United States v. Early, 25 U.S. (12 Wheat.) 136, 148 (1827).

Similarly inapposite, and equally unpersuasive, is the reasoning contained in a second line of authority which applies to all cases, not simply air piracy cases, in which a defendant is sentenced to imprisonment pursuant to a statute which mandates the imprisonment for a minimum term of years. This line of authority rests on the anomaly said to be created by 18 U.S.C. § 3651 which provides that: "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court ... may suspend the imposition or execution of sentence and place the defendant on probation." Several courts of appeals have adopted the argument that it was "illogical and inconsistent" to hold that a district court could suspend a sentence altogether, but not provide for early release. See, e.g., Jones v. United States, 419 F.2d 593, 598 (C.A. 8, 1969); United States v. Remling, 548 F.2d 1274, 1275 (C.A. 6, 1977).

They concluded that, if the district court has the power to suspend the imposition of sentence altogether, then a statute which merely prescribed a minimum term of imprisonment, without expressly excluding suspension of sentence, was not really "mandatory" sentence at all within the meaning of Section 7 of P.L. 85-752.

While we believe with Judge Weinstein that the anomaly allegedly created by Section 3651 should be resolved by Congress, and not by judicial fiat (United States v. Kleinzahler, 306 F. Supp. at 316), no anomaly is present where a life sentence has been imposed, because in such a case Section 3651 does not permit the sentence to be suspended. See United States v. Woods, 484 F.2d 127, 139 (C.A. 4, 1973). Indeed, the very fact that Congress excluded life sentences from the ambit of Section 3651 further supports our position here. Accordingly, it is not surprising that all of the cases creating an exception to Section 7 of P.L. 85-752 were cases which did not involve mandatory life sentences.

POINT TWO

THE COURT OF APPEALS HAS JURIS-
DICTION TO HEAR THIS APPEAL
PURSUANT TO 28 U.S.C. §1291

We believe that, if we are right in our argument that the district court was without power to make the defendant eligible for early parole, we would clearly be entitled to obtain relief by way of a petition for a writ of mandamus pursuant to 28 U.S.C. §1651. See, e.g., Ex parte United States, 242 U.S. 27 (1916); United States v. Regan, 503 F.2d 234 (C.A. 8, 1974); United States v. Mehrtens, 494 F.2d 1172, 1174 (C.A. 5, 1974); United States v. Lane, 284 F.2d 935, 939 (C.A. 9, 1960). We have proceeded by way of a direct appeal because mandamus is not an appropriate remedy, if there are other adequate means to obtain the relief sought (Kerr v. United States District Court, 426 U.S. 394, 403 (1976), and we believe that an appeal is plainly authorized by 28 U.S.C. §1291.

Section 1291, which permits appeals to the court of appeals from all "final decisions" of the district court, is applicable to criminal as well as civil cases. Abney v. United States, ___ U.S. ___, 97 S.Ct. 2034, 2041 (1977). Moreover, provided the requisite test of finality is met, the United States, as well as the defendant, may take advantage of it even though

an appeal is otherwise not authorized by the Criminal Appeals Act (18 U.S.C. §3731). As Chief Justice Warren observed in Carroll v. United States, 354 U.S. 394, 403-404 (1957):

"It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. §1291 without regard to the limitations of 18 U.S.C. §3731, just as in civil litigation orders of equivalent distinctness are appealable on the same authority without regard to the limitations of 28 U.S.C. §1292. The instances in criminal cases are very few. * * * In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision."

The "decision" from which we are appealing is clearly "final". It is from the judgment of conviction. "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation between the parties on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.'" Berman v. United States, 302 U.S. 211, 212-213 (1937). Moreover, the issue sought to be reviewed is "collateral to, and separable from", the issue which forms the basis of the main course of the criminal proceeding, "i.e. whether or not the accused is guilty of the offense charged." The elements of our claim, in short, "are completely independent of [the defendant's] guilt or innocence." Abney v. United States, ___ U.S. ___, 97 S.Ct. at 2040.

Nor do we perceive any policy reason for precluding an appeal in these circumstances. Indeed, if there were any such reasons, review by mandamus, which is discretionary, would not be available. Yet, as we have shown, such review is readily available to obtain relief from a sentence which the district court had no power to impose.

We have belabored what appears to us to be so obvious, because there is authority holding that the United States may not appeal in these circumstances. In United States v. Lane, 284 U.S. 935 (C.A. 9, 1960), the Court of Appeals for the Ninth Circuit held that the United States could not appeal from a sentence which it claimed the district court was without power to impose, although it did hold that relief was available by way of mandamus. In so holding, the Court of Appeals said (284 F.2d at 938):

"We hold that the attempted appeal from that part of the judgment which suspends the imposition of sentence and grants probation does not possess sufficient independence from the criminal proceeding to permit of a government appeal under 28 U.S.C.A. §1291.

We reach the same conclusion with respect to the attempted appeal from the order denying the government's motion made under rule 35 to correct the sentence. Such a motion is made in the original case.

Heflin v. United States, 358 U.S. 415, 418, 79 S.Ct. 451, 453, 3 L.Ed. 2d 407. Since it pertains to the validity of the judgment originally imposed, it has no more independence from the criminal proceeding than would an appeal from the judgment itself."

We believe that this rational is erroneous for two reasons. The condition, that an order be independent of the proceeding to which it relates in order to be appealable under Section 1291, evolved to limit appeals from decisions which did not otherwise possess the traditional requisites of finality. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-547 (1949); Carroll v. United States, 354 U.S. 394, 403-404 (1957). It is simply a reflection of the general policy against piecemeal appellate review. ^{4/} Where, however, the appeal is from a judgment that is truly final, there is no need to be concerned with the consequences of permitting piecemeal appellate review. Accordingly, as to such "final decisions" there is no need to be concerned with the degree to which the decision appealed from is "independent" from the criminal proceeding. Indeed, if the rule were otherwise, a defendant could never appeal from a judgment of conviction pursuant to 28 U.S.C. §1291.

^{4/} As the Supreme Court observed in the Cohen case (337 U.S. at 546):

Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."

More significantly, even in cases where the order appealed from "lacks the finality traditionally considered indispensable to appellate review" (Abney v. United States, 97 S.Ct. at 2040), the Supreme Court recently made clear that what it means by orders "independent" of the criminal case, are orders which resolve questions of law unrelated to the main issue of a criminal case, "i.e., whether or not the accused is guilty of the offense charged" (97 S.Ct. at 2040). Accordingly, it held that an appeal from an order denying a motion to dismiss an indictment on double jeopardy grounds was appealable. Surely the order here is far more final than the order in Abney v. United States, and at least equally as "independent" of the main issue in the criminal proceeding.

We, therefore, believe that the judgment of the district court from which we appeal is a "final" decision within the meaning of 28 U.S.C. §1291. Moreover, if we are wrong, we ask that the relief we seek be afforded by way of a writ of mandamus pursuant to 28 U.S.C. §1651. Because we have requested this alternative relief, we are serving a copy of our brief and appendix on the district court judge.

CONCLUSION

The part of the judgment of the district court, which designated that the defendant be eligible parole after serving eight years of her mandatory life sentence, be reversed. We ask, in the alternative, if there is no jurisdiction to entertain this appeal, that a writ of mandamus issue directing the district court to vacate that part of the judgment.

Dated: October 3, 1974.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

RITA BLOOM

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of October 1977s he served a copy of the within
Brief for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

Honorable John R. Bartels

Pierce O'Donnell, Esq.

United States District Judge

Williams & Connolly, Esqs.

Eastern District of New York

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and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County
of Kings, City of New York.

Rita Bloom

Sworn to before me this

5th day of October 1977.

OLGA S. MORGAN
Notary Public, State of New York
No. 24-450/966
Qualified in Kings County
Commission Expires March 30, 1979